Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA093402015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 May 2016	**On 8 June 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR HADER ALI
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent/Claimant: No appearance

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Clarke sitting at Richmond Magistrates' Court on 23 September 2015) allowing the claimant's appeal against the refusal of leave to remain as a Tier 4 Student Migrant on the ground that the refusal decision dated 19 January 2015 was

not in accordance with the law. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant requires anonymity for these proceedings in the Upper Tribunal.

Relevant Background

2. The claimant is a national of Pakistan, whose date of birth is 25 February 1984. He first entered the United Kingdom on 5 April 2011 with valid entry clearance as a student. On 24 August 2012 he applied for leave to remain as a student. The application was refused on 16 August 2013 with a right of appeal. In a decision promulgated on 3 July 2014 the appellant's appeal was remitted back to the Secretary of State to allow him 60 days to find fresh sponsorship and for a new decision to be made.

3. On 3 December 2014 the Home Office issued the claimant with a 60 day letter. In the letter, which was addressed to his legal representatives, the Home Office said that the decision to revoke the licence of Hendon Business School on 3 April 2013 meant that the CAS that their client had submitted with his outstanding application (made on 24 August 2012) was no longer valid and at present his application would fall to be refused. But before the final decision was made, and in line with the Rules and Guidance, the consideration of his application was going to be suspended for a period of 60 calendar days. During the 60 day period it was open to their client to withdraw his application and submit a fresh application in a different category or to leave the United Kingdom. If he wished to remain in the UK as a Tier 4 Student, it was open to their client to obtain a new CAS for a course of study at a fully licensed Tier 4 educational sponsor and then to submit an application to vary the grounds of his original application. In order to assist their client in obtaining a new CAS, they were enclosing with the letter an information leaflet which they could take to any potential new sponsors. Also enclosed with the letter was a certified copy of their client's passport. If they decide to obtain a new CAS, then their client's sponsor would need to see and retain this copy.

4. His 60 day period would end on 1 February 2015. No further extensions beyond the 60 day calendar day period would be allowed. The decision would be reached on the application after the end of the 60 day period. If their client failed to submit a new valid CAS together with the required supporting documentation within the 60 day period, then his application would be considered on the basis of the information currently available and would therefore fall to be refused.

5. On 19 February 2015 the Home Office issued a refusal letter. The period of 60 days afforded to the claimant had ended on 1 February 2015. But no response had been received to date in respect of the letter dated 3 December 2014. So his application had been assessed on the documentation previously submitted and available at the time of consideration. His application fell to be refused under 322(9) of the Rules, and also under paragraphs 245ZX(a) and 245ZX(c) of the Rules.

6. On the following day, 20 February 2015, the claimant's solicitors wrote to the Home Office seeking an extension of time for their client to get a CAS.

7. On 20 March 2015 the Home Office responded to the claimant's solicitors, thanking them for their letter dated 20 February 2015 regarding an extension of time for their client to get a CAS. However, the application for leave to remain had already been refused on 19 February 2015.

The Hearing Before, and the Decision of, the First-tier Tribunal

8. Both parties were legally represented before Judge Clarke. The appellant gave oral evidence, and adopted as his evidence-in-chief a witness statement dated 18 September 2015.

9. After the Home Office had issued a 60 day letter, he began to search for institutes and began preparing his application. He did not want to risk having a CAS issued prior to his application being made. On 17 January 2015 he had an accident in which he had injured his back. He stayed in bed for two days, and on the third day his friend called a taxi and took him to the doctor. He suggested full bed rest and also arranged for him to have an x-ray. The doctor issued him with a sick note, which he forwarded to his legal representatives. He requested the Home Office be informed of his situation in order to extend the 60 day period. His representatives forwarded everything to the Home Office, but the refusal letter was issued "prior to receiving the documents". Under cover of the letter dated 20 March 2015, the Home Office returned the sick note which his representatives had provided.

10. He asked that the Tribunal should take into consideration his unfortunate circumstances, which were beyond his control.

11. In his subsequent decision, the judge said the claimant had provided two reasons for failing to provide a valid CAS. Firstly, he was unable to advance his university applications until such time as he had a 60 day letter from the Secretary of State. Secondly, following his fall on 17 January 2015 he was bedridden for a couple of days, and was referred for x-rays and he subsequently received physiotherapy.

12. The judge found that the claimant had been proactive in seeking to obtain a valid CAS once he received the 60 day letter. An example of him being pro-active was that he had obtained a bank statement from his mother to show the funds that he had available. Furthermore, when he realised that he would not be able to attend the various sponsor colleges in the latter part of January 2015, he contacted his representatives and took steps to inform the Home Office of his plight. The judge was also conscious that the 60 day period spanned the Christmas and New Year holidays when colleges and universities would have been closed. His finding that the claimant had made efforts to secure a sponsor was confirmed by the evidence that was before him that the claimant had now secured a conditional offer from Middlesex University, and it was clear that he had the requisite funds in place. He

had paid a deposit of £3,000 in respect of the total fees due of £18,100. The judge continued in paragraph [23]:

> "It is well established in the case law that the appellant has a legitimate expectation that the respondent will act fairly. I find that there is a lack of fairness for the respondent to delay for five months due to his 60 day letter and yet in less than three weeks make a decision to refuse the application. I find that the appellant was proactive in obtaining his documentation but was hampered in his efforts by his fall of 17 January 2015. The appellant also informed the respondent of his circumstances and asked the respondent to exercise his discretion. It is not clear from the Reasons for Refusal Letter what matters the respondent took into consideration in which he decided that discretion should not be exercised in favour of the appellant. In the absence of the respondent failing to justify the exercise of her discretion, I find that the impugned decision is not in accordance with the law."

The Application for Permission to Appeal to the Upper Tribunal

13. A member of the specialist appeals team settled an application for permission to appeal to the Upper Tribunal. It was submitted that the First-tier Tribunal Judge simply could not find that the Secretary of State had acted unfairly, bearing in mind what the Court of Appeal had said in **EK (Ivory Coast) v Secretary of State for the Home Department [2014] EWCA Civ 1517** at paragraph [38].

The Reasons for the Grant of Permission to Appeal

14. On 12 April 2016 First-tier Tribunal Judge McDade granted the Secretary of State permission to appeal as it was arguable that the judge did not have good grounds to find that the Secretary of State had acted unfairly in all the circumstances.

The Hearing in the Upper Tribunal

15. At the hearing before me to determine whether an error of law was made out, there was no appearance by or on behalf of the claimant. There was also no Rule 24 response on file.

16. Mr Tufan relied on the Court of Appeal decision in **Kaur v Secretary of State for the Home Department [2015] EWCA Civ 13** in which Burnett LJ said at paragraph [41]:

> "The points-based system for determining whether to grant leave to enter or remain in the United Kingdom, which applies to students as well as a number of other categories of applicant, is designed to achieve predictability, administrative simplicity and certainty. It does so at the expense of discretion, that is to say it is prescriptive. The consequence is that failure to comply with all its detailed requirements will usually lead to a failure to earn the points in question and thus refusal ... It was that important background which informed the decision in **EK (Ivory Coast)**."

17. Burnett LJ went on to say in paragraph [42] that **EK (Ivory Coast)** is binding authority on the question of whether the Secretary of State should, as a matter of fairness, give notice to an applicant for leave to remain or to the Tier 4 sponsor that she considers there to be a deficiency in the CAS before making an adverse decision on that basis: "There is no such obligation."

Discussion

18. The judge has clearly erred in his assessment of the evidence. The judge has failed to distinguish between the information that was made available to the Secretary of State before the date of decision as distinct from the information that arrived later. On a careful reading of the claimant's witness statement, the claimant does not in terms assert that his representatives sought an extension of time *before* a decision was made on his application. On the contrary, the implication is that the plea for an extension of time, together with the supporting evidence, arrived too late. The plea for an extension, together with the sick note, did not reach the Home Office until some time after 20 February 2015, whereas the decision on the application had been made on 19 February 2015. So there was no evidential platform for a finding that the Secretary of State had failed to consider whether to grant the claimant an extension of time in the light of the representations made by his representatives, and the accompanying sick note.

19. The judge also misdirected himself in law in failing to recognise the limited circumstances in which the Tribunal can grant relief on the grounds of a breach of the common law duty of fairness. In comparison to the generality of students who from time to time are issued with 60 day letters following the revocation of a sponsor's licence, the claimant was at an advantage, as the 60 day letter did not come out of the blue. He knew that it was coming. The fact that he did not know precisely when it was coming did not prevent him from making preliminary enquiries of potential sponsors so as to be properly prepared once the 60 day letter arrived.

20. Following **EK (Ivory Coast),** the Secretary of State was under no obligation to enquire as to the reasons why the claimant had not provided a new CAS within the time limit of 1 February 2015. Further, even if the Secretary of State had taken into account that the 60 day period included the Christmas and New Year holiday season and also that the claimant had been partially incapacitated for the last two weeks of January 2015, she had made it clear in the letter of 3 December 2014 that it was her policy to require strict compliance with the 60 day time limit.

21. It was within the wide ambit of the Secretary of State's discretion to be satisfied that the refusal remained appropriate and that she was not prepared to exercise discretion in the claimant's favour. Since the Secretary of State had purported to exercise discretion, albeit not in the claimant's favour, the claimant was not entitled to relief on the ground that the Secretary of State had not exercised discretion at all (see **UKUS**) or on the ground that she should have exercised her discretion differently (see **Patel**).

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant's appeal against the decision to vary his leave to remain as a Tier 4 (General) Student Migrant, and against the concomitant decision to remove him under Section 47 of the 2006 Act, is dismissed.

No anonymity direction is made.

Signed Date 8th June 2016

Deputy Upper Tribunal Judge Monson